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February 6, 2018

Bill Flory

Dear Bill:

Attached is a letter which we think would be informative for house and senate members regarding the legal and constitutional problems with HB 5456.

The problems noted should help underscore the need to consider the proposed amendment which was drafted by Lane.

Can you take care of disseminating this letter to all concerned? Thanks.

Sincerely,

MICHAEL B. SERLING, P.C.



Philip J. Goodman
Of Counsel

PJG/dfg

cc: Eric B. Abramson, Esq.
Michael B. Serling, Esq.
Lane Clack, Esq.
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NAME
ADDRESS
CSZ

Re: Legal and Constitutional Problems in House Bill 5456

Dear Members of the Michigan House and Senate:

Currently pending before the Committee on Michigan Competitiveness is House Bill 5456 which is commonly known as the "Asbestos Bankruptcy Trust Claims Transparency Act." A similar bill was introduced in 2015, but it failed to be voted out of committee.

We believe the bill is seriously flawed, and in addition to the basic unfairness of its provisions, set forth below are some of the legal and constitutional reasons we believe it should be opposed.

EQUAL PROTECTION PROBLEMS

Section 3014(3) of House Bill 5456 states:

"Trust Materials that are sufficient to entitle a claim to consideration for payment under the applicable trust governance documents are sufficient to support a jury finding that the plaintiff was exposed to products for which the trust was established to provide compensation and that, under applicable law, the exposure is a substantial contributing factor in causing the plaintiff's injury.

This provision eliminates the current burden of proof on defendants in asbestos personal injury cases to prove the elements of negligence and product liability for bankrupt non-parties. In the absence of this provision, defendants who wish to have non-parties held proportionately responsible for plaintiffs' injuries must prove by a preponderance of the evidence the elements of negligence (duty, breach of duty, proximate cause and damage) and product liability (failure to use reasonable care, defective design, etc.) in order for the bankrupt company to be included in a verdict form on which the jury can apportion damages.

The new proposed standard simply allows a finding of liability without more evidence than that the plaintiff would be able to submit "a claim to consideration for payment", regardless of whether the evidence would be sufficient to get past a motion for directed verdict under Michigan law, or even the requirements of the particular bankruptcy trust, to support a judgment or claim payment.

By lowering the standard for defendants to claim non-party liability in asbestos personal injury cases, one could argue the legislation would violate equal protection of the laws, maintaining that burden on defendants in non-asbestos personal injury cases and providing a unique and narrow exception for bankrupt former asbestos manufacturers.

In essence, this law, designed to alleviate the evidentiary burden currently imposed on asbestos defendants, imposes a greater burden on asbestos personal injury plaintiffs (apart from other personal injury victims) and creates a mechanism for defendant asbestos companies to "water down" their portion of liability by allowing them to raise, but not prove, liability by non-party bankrupt defendants.

Because Section 3014(3) creates different standards and rules for victims of asbestos-related torts, as opposed to victims of other products or substances, there is a question whether this law would violate equal protection principles.

"The equal protection clauses of the Michigan and United States constitutions provide that no person shall be denied the equal protection of the law. This Court has held that Michigan's equal protection provision is coextensive with the Equal Protection Clause of the United States Constitution. The Equal Protection Clause requires that all persons similarly situated be treated alike under the law. When reviewing the validity of state legislation or other official action that is challenged as denying equal protection, the threshold inquiry is whether plaintiff was treated differently from a similarly situated entity. The general rule is that legislation that treats similarly situated groups disparately is presumed valid and will be sustained if it passes the rational basis standard of review: that is, the classification drawn by the legislation is rationally related to a legitimate state interest. Under this deferential standard, "the burden of showing a statute to be unconstitutional is on the challenging party, not on the party defending the statute[.]"

However, when legislation treats similarly situated groups disparately on the basis of a suspect classification, such as race, alienage, or national origin, or infringes on a fundamental right protected by the Constitution, such as the free exercise of religion, the legislation will only be sustained if it passes the rigorous strict scrutiny standard of review: that is, the

government bears the burden of establishing that the classification drawn is narrowly tailored to serve a compelling governmental interest.

If entities are treated differently on the basis of the quasi-suspect classes of gender and illegitimacy, intermediate scrutiny applies, and the burden is on the government to show that the classification serves important governmental objectives and that the means employed are substantially related to the achievement of those objectives.”

Shepherd Montessori Center Milan v Ann Arbor Charter Twp., 486 Mich 311, 318 (2010)

Because Section 3014(3) treats asbestos personal injury plaintiffs differently from plaintiffs harmed by other products and substances, and limits the role played by a jury in the former group, it impacts upon a fundamental right protected by Michigan’s constitution, the right of trial by jury, more severely than on non-asbestos plaintiffs.

The legislation contains no information or assertion of fact that there exists any “compelling governmental interest” in depriving plaintiffs injured by asbestos of the same rights held by plaintiffs in cases related to injuries from different products and substances. In 2015, when the “Asbestos Bankruptcy Trust Claims Transparency Act”, Senate Bill 3461, was introduced, there were a multitude of “findings” by the Legislature relating to activities among various asbestos bankruptcy trusts around the country. This preamble language was seemingly offered to provide a “rationale” for the restrictions being placed on asbestos plaintiffs in that legislation. None of the reasons espoused to support that proposed law related to any cases in the Michigan courts or claims made by Michigan residents with bankruptcy trusts, and SB 3461 died in committee.

HB5456 contains no statement of any reasons why this proposed law is necessary. Clearly, there is “no rational basis” for the dissimilar treatment that would be created by HB 5456 if enacted. *Village of Willowbrook v Olech*, 528 U.S. 562, 564; 120 S Ct 1073; 145 L.Ed.2d 1060 (2000). Given the lack of cogent reasons to impose the different treatment for plaintiffs injured by asbestos, the proposed statute is ripe for constitutional challenge.

VIOLATION OF MCL 600.2956 AS TO SEVERAL LIABILITY

Besides its constitutional problems, HB 5456 creates a direct conflict with MCL 600.2956 which provides:

“Except as provided in section 6304, in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, the liability of each defendant for damages is several only and is not joint.”

Section 3015 of HB 5456 empowers a trial court to reopen an asbestos personal injury case if additional trust claims are filed after obtaining a judgment in the asbestos action. The proposed statute confers authority on the court to: "... adjust the judgment by the amount of any subsequent asbestos trust payments obtained by the plaintiff" This provision directly contradicts Michigan's prohibition on joint liability. The concept of reopening and adjusting an asbestos personal injury judgment by any amount obtained subsequently from a bankruptcy trust would unfairly penalize plaintiffs and create a special, narrow version or "joint and several" liability just for asbestos personal injury cases where plaintiffs received payments from bankrupt asbestos companies which may not have even been known about when the judgment was obtained. Plaintiffs do not always know all of the identities of the companies to whose products they were exposed when their cases are filed. Many learn through discovery, or even after a case is over, that they may have been exposed to the products of a bankrupt company and should be able to file their claims without jeopardizing the recoveries they made in litigation against companies that were known.

Section 3015 directs a trial court to "reopen and adjust" a judgment, with no direction or consideration of Michigan's rule of several liability. Because there is no "joint" liability, there would be no lawful basis for the court to share any of the recovered amount with defendants against whom a judgement had been obtained. Under Michigan law, each defendant has their own proportionate liability and money from additional sources (bankrupt non-parties) may not apply to reduce the liability of any other defendant.

VIOLATION OF CONSTITUTIONAL RIGHT TO A JURY TRIAL

Michigan's Constitution specifically addresses the right to a trial by jury:

"... [t]he right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law."

Const. 1963, art. I, §14.

Section 3014(3) of HB 5456 mandates that "[t]rust materials that are sufficient to entitle a claim to consideration for payment ... are sufficient to support a jury finding that the plaintiff was exposed to products for which the trust was established and that, under applicable law the exposure is a substantial contributing factor in causing the plaintiff's injury." This section of the proposed legislation would essentially remove from the jury the right to determine the critical facts giving rise to liability of non-parties for asbestos exposure.

In *Phillips v Mirac, Inc.*, 251 Mich.App. 586 (2002), the court held that a statutory damages cap imposed by MCL §257.401(3) did not violate a plaintiff's right to jury trial. Besides noting the legislature's authority to abolish or modify common law rights and remedies, the panel concluded that the statute did not impinge on a jury's right to decide cases because the cap did not remove from the jury the determination of the facts or the amount of damages incurred. The court

found that because the statute only limited the “legal consequences of the jury’s finding” there was no deprivation of the right to jury consideration of the plaintiff’s claims, the cap was constitutional.

Here, on the other hand, Section 3014(3) basically instructs the jury that if there are “trust materials” which can support a bankruptcy claim, that automatically means that the plaintiff was exposed to the bankrupt company’s products and that the exposure was a “substantial contributing factor”, depriving the jury of the discretion to decide those critical findings based on the evidence of what happened to the plaintiff.¹ In *Phillips*, (as noted by the court in *Zdrojewski v Murphy*, 254 Mich.App. 50 (2003)) the court found the plaintiff was still able to try his case in front of a jury that rendered a verdict awarding the plaintiff damages. Because the jury could not be informed of the cap, the court found the jury rendered its verdict on the basis of the facts and, therefore, the jury was not “constrained” in reaching its verdict because of the requirements of the statute. Here, the result would be different. The statute takes away the jury’s ability to weigh the evidence regarding exposure and the degree of exposure in finding whether any bankrupt non-parties (under MCR 600.6306) are liable for negligence or breached their duties to plaintiffs. In doing so, the statute deprives a plaintiff of the right to a trial by jury in violation of the Michigan Constitution of 1963.

We hope that upon consideration of these matters you will decide to reject this poor and discriminatory piece of legislation.

Sincerely,

MICHAEL B. SERLING, P.C.

Philip J. Goodman
Of Counsel

PJG/dfg

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¹ The statute makes no mention of or sets forth any facts which must be contained in the “trust materials” which would be necessary to such a finding.